

Supreme Court, U. S.
FILED

SEP 28 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-448

**BLUE CROSS MUTUAL HOSPITAL INSURANCE, INC.,
BLUE SHIELD MUTUAL MEDICAL INSURANCE, INC.,**

Petitioners,

vs.

BEVERLY JEANNE JENKINS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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The Petitioners, Blue Cross Mutual Hospital Insurance, Inc. and Blue Shield Mutual Medical Insurance, Inc. (hereinafter "Blue Cross-Blue Shield"), respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter called "Seventh Circuit") entered in this cause on July 21, 1976.

OPINIONS BELOW

The original opinion of a panel of the Seventh Circuit is reported at 522 F.2d 1235 and printed in the Appendix hereto at 8a. The opinion of the Seventh Circuit on rehearing *en banc* with Judges Tone, Pell and Bauer dissenting is reported at F.2d, 13 F.E.P. Cases 52, and printed in the Appendix hereto at 18a. The pertinent orders of the United States District Court for the Southern District of Indiana, Indianapolis Division, are printed in the Appendix hereto at 1a, 2a.

JURISDICTION

The decision of the Seventh Circuit sitting *en banc* with Judges Tone, Pell and Bauer dissenting was entered on July 21, 1976. This Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Does a district court's denial of a preliminary injunction make appealable an order of the district court determining that the action not be maintained as a class action where the time for appealing the class action determination has run and where the order denying the preliminary injunction was not necessarily based on the class action order?

2. Can a Plaintiff in a Title VII action who filed suit prior to any attempt at conciliation by the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC") raise issues in her judicial complaint which are in no way like or related to the allegations in her charge to the EEOC, did not grow out of an EEOC investigation and were not the subject of EEOC conciliation efforts prior to the filing of the complaint?

3. Can a Plaintiff in a Title VII action who filed suit prior to any attempt at conciliation by the EEOC raise issues in her judicial complaint which were not stated in her charge to the EEOC, did not grow out of an EEOC investigation and were not the subject of EEOC conciliation efforts prior to the filing of the complaint?

4. Can a Plaintiff in a Title VII action who filed suit prior to any attempt at conciliation by the EEOC raise issues of sex discrimination in her judicial complaint where she states no sex discrimination issues in her EEOC charge and where sex discrimination issues did not grow out of an EEOC investigation and were not the subject of EEOC conciliation efforts prior to the filing of the complaint?

FEDERAL STATUTES INVOLVED

The federal statutes involved are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.*, and more particularly 42 U.S.C. Sections 2000e-5(b) and -5(f)(1), Appendix 28a-30a, and 28 U.S.C. 1292(a)(1), Appendix 31a, and Rule 4(a) of the Federal Rules of Appellate Procedure, Appendix 31a (set out in pertinent part).

STATEMENT OF THE CASE

Basis of Federal Jurisdiction. Plaintiff brought this action in the United States District Court for the Southern District of Indiana, Indianapolis Division, pursuant to 42 U.S.C. Section 2000 (e)-5(f) and 42 U.S.C. Section 1981. Jurisdiction of the Seventh Circuit was invoked pursuant to 28 U.S.C. Section 1292 (a)(1) when Respondent appealed the denial of her requested preliminary injunction by the District Court.

Facts of Case. Beverly Jeanne Jenkins filed a charge of discrimination against Blue Cross-Blue Shield with the EEOC on June 8, 1971. (Def. App. 1, Pl. App. 1a¹.) She checked the box marked "race or color" and made the following statement of her charge:

"I feel that I am being discriminated in the terms and conditions of my employment because of my race, negro. I have worked for Blue Cross and Blue Shield approx. three years during which time I [had] no problem until May, 1970 when I got my natural hair style. Later when I came up for promotion, it was denied because my supervisor, Al Frymier, said I could never represent Blue Cross with my Afro. He also accused me of being the leader of the girls on the floor. The pressures I was working under kept me upset, therefore, I asked for a leave of absence. I was told I had to take a vacation before I could be granted a leave of absence. I was granted a week of vacation and on my return I was asked to take a ninety day leave, quit, or be fired, time they said to get myself together; and at the end of this time they would be able to place me on another job. A White employee who associated with me might have been denied her promotion because of her association with me."

¹ References to "Def. App." or "Pl. App." refer to the appendices filed by the parties in the Seventh Circuit.

Before the EEOC could investigate or attempt to conciliate her charge, Miss Jenkins' attorneys filed the broadest conceivable class action in the United States District Court for the Southern District of Indiana, Indianapolis Division, on August 28, 1972. (Def. App. 1.) The complaint included boilerplate class action allegations of pattern and practice race and sex discrimination in hiring, assignment, dress, pay, promotion, recruitment, job requirements and testing.²

² Specifically plaintiff's complaint alleged that Blue Cross-Blue Shield discriminated on the basis of race and sex by:

"a. Maintaining requirements for office and clerical positions which denied blacks equal opportunity for employment in such positions which are neither job-related nor necessary to the safe, efficient conduct of defendant's business.

b. Requiring employees to stay within strictly delineated confines of dress codes and hairstyles which, not only discriminate against blacks because of their race, but more invidiously imperils the ability of blacks to rid themselves of a vestige of slavery by requiring them to accept white hairstyles and dress styles as a term and condition of employment.

c. Failing and refusing to hire, facilitate the hiring of, or promote persons who are black to supervisory or managerial positions in departments other than those where the majority of workers are black.

d. Assigning blacks and women to the lowest-paying office and clerical jobs and virtually excluding them from higher-paying office and clerical and managerial positions.

e. Paying blacks less money than whites for identical jobs.

f. Failing and refusing to promote blacks and women because of their race and sex.

g. Failing and refusing to hire blacks because of their race.

h. Failing to recruit blacks on the same basis for the same jobs as whites.

i. Utilizing paper and pencil tests which deny and tend to deny black persons equal opportunity for hiring and promotion, which tests are not job-related and are not necessary to the safe and efficient conduct of the defendants' business."

(Footnote continued on following page)

In her initial answers to Defendants' first interrogatories more than six months after the suit was filed Miss Jenkins admitted that she had no real factual support for her boilerplate class action allegations (Def. App. 7) nor could she elaborate meaningfully on those allegations in her deposition.

In January, 1974, Defendants moved the District Court to determine that the action not be maintained as a class action. At that time, after almost a year of discovery on the broadest possible basis, Plaintiff was unable to name another single individual with a complaint even remotely similar to hers, and the only named alleged class members were three individuals who sought unsuccessfully to intervene in her lawsuit.

After Defendants filed their motion, Plaintiff's attorneys rushed to Court with a petition for a preliminary injunction and/or partial summary judgment. The motion sought to enjoin Defendants' from using a supervisory performance review system.

On July 17, 1974, the District Court issued its order determining that Plaintiff's action not be maintained as a class action. Appendix 2a. The District Court applied the "like and related" test and on the basis of that test determined that the class Plaintiff could represent in a Title VII suit was limited to persons denied promotion

² continued

The complaint requested injunctive relief against these alleged practices, as well as reinstatement of the plaintiff and back pay and other restitutionary relief for the plaintiff and other members of the alleged class injured because of the allegedly discriminatory practices.

or not hired for wearing an Afro hair style. Since no evidence had been presented to show that this group would be so large that joinder would be impracticable, the class action was not allowed.

On January 21, 1975, the District Court denied Plaintiff's motion for preliminary injunction and/or summary judgment and plaintiff appealed this denial pursuant to 28 U.S.C. Section 1292 (a)(1). Appendix 1a. On September 8, 1975, a three member panel of the United States Court of Appeals for the Seventh Circuit ruled that:

"Upon careful examination of the complaint and the charge, Judges Bauer and Tone agree that the Trial Court properly construed the particular charge here in light of the general principles, and that the charge does not form a proper basis for the complaint that the Defendant pursued a practice and pattern of discrimination in the manner alleged in the complaint. Judge Tuttle would hold that the charge was sufficient under the announced standard to support the allegations of the complaint. The Court is unanimously of the view that the charge does not form a proper basis under Title VII of any complaint of discrimination on the basis of sex."

Appendix 17a.

Plaintiff petitioned for rehearing *en banc* and rehearing was granted. On July 21, 1976, the Seventh Circuit sitting *en banc* overturned the three judge panel decision by a vote of 4 to 3 ruling that:

"The majority of this court conclude that the Plaintiff sufficiently charged both racial and sex discrimination in her EEOC form in order to be eligible to represent a class composed of 'all black and female persons who are employed, by Blue Cross-Blue Shield, Inc.'"

Appendix 25a, 26a.

The judgment of the District Court was reversed and the case remanded for further proceedings not inconsistent with the July 21, 1976 opinion.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SEVENTH CIRCUIT INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

A.

The Plaintiff appealed to the Seventh Circuit under 28 U.S.C. Section 1292(a)(1), which provides for appeal of the denial of a preliminary injunction. Yet on appeal she sought and the Seventh Circuit granted review of the District Court's determination that the action not be maintained as a class action.

The panel decision of the Seventh Circuit recognized that class action determinations are not appealable orders except in rare instances not invoked by Plaintiff in this case. The panel, however, allowed review because it held the class determination directly controlled the subsequent disposition of the request for preliminary injunction.³

However, if that were so then Plaintiff's right of appeal matured at the time the district court issued its class action order, July 17, 1974, and her notice of appeal of that order, which was not filed until February, 1975, was clearly untimely.

Meanwhile, the District Court's order denying the motion for preliminary injunction makes no reference whatever to the class action order. The preliminary in-

³ On this issue the panel was affirmed unanimously by the Court *en banc*.

junction request could have been denied for failure to meet the requirements for preliminary relief even if it had not been outside the scope of the action.

Neither the Plaintiff nor the Seventh Circuit cite authority for allowing review of a class action determination in such circumstances.⁴

Permitting appellate review of such an order in the circumstances is in direct conflict with the express limitations of 28 U.S.C. Sec. 1292(a)(1) and with the time limits imposed by Rule 4(a) of the Federal Rules of Appellate Procedure.

B.

No issue is more important and fundamental to the administration and development of the law under Title VII of the Civil Rights Act of 1964 than the scope of the complaint which a charging party may file in federal district court under that statute; and that issue is raised squarely and unavoidably by the decision of the Seventh Circuit Court of Appeals in this case.

Under Title VII's statutory scheme the charge filed with the EEOC serves first to activate the investigative and conciliatory procedures of Title VII. If, and only if, those procedures fail to effect voluntary compliance, the charge defines the scope of the issues for purposes of prompt adjudication. This basic scheme was specifically recognized by the Court in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970):

⁴ The cases cited in the Seventh Circuit panel decision are inapposite to the questions posed by this case. The cases cited *all* involved appeals directly from the orders reviewed. In one case the order appealed from was an order of dismissal, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), and in another appeal of a class action order was *denied*, *Hackett v. General Host. Corp.*, 455 F.2d 618 (3rd Cir. 1972). None of the cases cited permitted a plaintiff to get review of a class action order issued six months prior to the filing of the notice of appeal.

"A charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed the Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of a court action."

See also *Bowes v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1968).

To accommodate those situations where an EEOC investigation has raised issues not specified in the charge to the EEOC but "like or related" to those issues specified the courts created the "like and related" test. In *King v. Georgia Power Co.*, 295 F.Supp. 943, 947 (N.D. Ga. 1968), the source case for the test, the court said:

"This rule, broadly speaking, in effect limits the civil action to that range of issues that would have been the subject matter of the conciliation efforts between EEOC and the employer. *If the civil action were not so limited, then the primary emphasis of this Title would be circumvented, i.e., an emphasis upon voluntary settlement of all issues without an action in the District Court.*" (Emphasis added.)

In fashioning the rule the court in *King* particularly heeded the EEOC's argument:⁵

"The practice of the Equal Employment Opportunity Commission is to follow this general principle

⁵ Now even the EEOC is backing away from expansion of charges to include "like and related" issues. In its recent memorandum on procedures for handling pre-FY 1974 charges, the EEOC said:

"For all pre-FY 1974 charges, any addition of any like-and-related or growing-out-of issues should be avoided." 93 BNA Lab. Rel. Rep. 6 (Sept. 6, 1976).

[recited in the above text] and take evidence, make findings, and seek to obtain relief with respect to those unlawful employment practices which are like and related to the charge filed and which grow out of the proceedings before the Commission. In order that respondent employers will be susceptible to the conciliation process, we believe there should be consistency between the scope of relief that is available in court and that which is likely to flow from conciliation by the Commission, and that deference should therefore be given the Commission's interpretation of the scope of inquiry." *Id.* at 947 n. 2.

The *King* rule and reasoning were later approved and followed in *Sanchez v. Standard Brands, Inc.*, *supra*.

The decision of the Seventh Circuit in the present case turns its back totally on this recognized and well-established relationship between the charge, investigation, and conciliation by the EEOC and repudiates the whole concept of the "like and related" test. In the present case Plaintiff filed her lawsuit before the EEOC had processed her charge. Her charge itself had not been investigated by the EEOC. At the time she filed her lawsuit the EEOC had made no attempt whatsoever at conciliation of any of the matters alleged in her judicial complaint. Yet, the Seventh Circuit would reward Plaintiff for bypassing the EEOC by permitting her to raise in her judicial complaint matters far beyond the allegations in her charge to the EEOC.

One cannot conceive a charge narrower or more unique than that filed in this case by the Plaintiff with the EEOC, nor can one conceive a complaint with allegations broader than the boilerplate class allegations in Plaintiff's complaint. Yet, the Seventh Circuit ruled that Plaintiff's charge was sufficiently broad to support her complaint.

Plaintiff's attorneys have argued that the voluntary compliance policy is satisfied by letting the EEOC seek conciliation *after* the lawsuit is filed. This is like sending in the peacemakers after the war has started. This Court has recognized properly that filing a lawsuit discourages conciliation where the single biggest inducement to conciliation is the avoidance of litigation. This Court said in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975): "We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation . . .". In addition, the EEOC would lose all control of the conciliation procedure when, as was the case here, the plaintiff filed a class action.

There may be some justification for permitting a plaintiff to raise in court issues not specified or raised in a charge to the EEOC where they are like and related issues which were developed by the EEOC in its investigation and were the subject of EEOC efforts at conciliation since such expansion does not circumvent the statutory policy favoring conciliation and voluntary compliance. But there can be no justification for permitting a plaintiff's attorneys to depart totally from her charge in a situation where there has been no EEOC investigation or attempt at conciliation.

The Seventh Circuit's decision in this case gives a plaintiff's attorneys a blank sheet to write on if they file suit without giving the EEOC opportunity to investigate and conciliate. Such a rule frustrates totally the voluntary compliance policy of Title VII. The only conceivable beneficiary of such a rule would be the Title VII plaintiffs' bar, since the rule would obviously be fee-generating by encouraging the filing of lawsuits and frustrating voluntary compliance. It has never been a policy of Title VII to encourage litigation at the expense of voluntary compliance and since the 1972 amendments to Title VII primary reliance for enforcement has been

placed on the EEOC, not private parties. In *EEOC v. General Elec. Co.*, 532 F.2d 359, 373 (4th Cir. 1976), the court said:

"... it was clear that Congress intended by these amendments to place 'primary reliance upon the powers of enforcement to be conferred upon the Commission [by the Amendments in their grant to it of the power to sue] and not upon private lawsuits, to achieve equal employment opportunity.'"

Failure to limit the scope of court litigation in recognition of the policy favoring voluntary compliance guts the statute and can only lead to the situation disclaimed by *Sanchez* where the charge to the EEOC is only "... a preliminary to a lawsuit. . . .".

If the ruling of the Seventh Circuit stands, then Title VII has become little more than an amendment to 42 U.S.C. Section 1981 to allow attorneys' fees. That was not the intent of Congress, which placed primary emphasis on the voluntary compliance procedures of Title VII, and that was not the understanding of the many courts which have since reviewed Title VII and emphasized the voluntary compliance procedures. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), this Court itself said regarding the elimination of discrimination under Title VII:

"Cooperation and voluntary compliance were selected as the preferred means for achieving this goal."

C.

The Seventh Circuit's decision also involves the question of whether a plaintiff whose charge to the EEOC did not raise issues of sex discrimination may raise those issues in her judicial complaint.

In her charge to the EEOC the Plaintiff did not mention or allude to sex discrimination in any way. The only way sex got into her charge at all was through the fact that in her narrative statement of her charge Plaintiff used the word "girls" to refer to some other employees and used two personal pronouns of the feminine gender.

The Seventh Circuit determined that this was sufficient to raise issues of sex discrimination in hiring, recruitment, job requirements, pay, promotion, assignments, dress, and testing.

No other court has departed so far from reality in assessing the scope of a charge. A few courts have permitted a plaintiff to raise sex discrimination issues in a judicial complaint when they were not raised in the charge, but in those cases the sex discrimination issues had been raised by the EEOC in its investigation of the charge. See, e.g., *EEOC v. Mack Trucks, Inc.*, 10 F.E.P. Cases 1028 (D. Md. 1974); *EEOC v. Mississippi Federal Co-op. Services*, 8 F.E.P. Cases 731 (S.D. Miss. 1974); *Latino v. Rainbo Bakers, Inc.*, 358 F. Supp. 870 (D. Col. 1973). However, most courts have not permitted sex discrimination issues to be raised in a judicial complaint even where they were developed by the EEOC in its investigation if the issues were not raised by the charge. See, e.g., *Belcher v. Bassett Furniture Indus.*, 376 F. Supp. 593 (W.D. Va. 1974); *EEOC v. Hearst Corp.*, 10 C.C.H. E.P.D. 10246 (W.D. Wash. 1974); *EEOC v. Rexall Drugs Co.*, 9 C.C.H. E.P.D. 9936 (E.D. Mo. 1974); *EEOC v. New York Times Broadcasting Service, Inc.*, 346 F. Supp. 651 (W.D. Tenn. 1973).

Most importantly, prior to this decision no court had ever permitted a plaintiff who did not allege sex discrimination in her charge to the EEOC to raise sex dis-

crimination in a judicial complaint where issues of sex discrimination were not developed by the EEOC in its investigation.

In summary, under the Seventh Circuit's unique view, all charges apparently must raise issues of sex discrimination so long as the charging party is of one sex or another. The logical extension of this ruling is that all charges also raise issues of race discrimination, since all charging parties belong to one race or another. To put it even more simply, the charge to the EEOC is meaningless—a piece of paper. Once the charging party has signed his name to the charge, even if he does nothing else, he has standing to file suit in court after 180 days, regardless of what the EEOC does, and raise any and all conceivable issues of race and sex discrimination.

II.

THE SEVENTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

The decision of the Seventh Circuit conflicts with the very decision it purported to follow as well as other circuit court decisions on the same point.

In *Danner v. Phillips Petroleum, Inc.*, 447 F.2d 159 (5th Cir. 1971), the plaintiff's charge fairly described sex discrimination. In *Danner*, the charge stated:

"They took a young roustabout and gave him my job and laid me off. Therefore due to the fact that my position was not eliminated, just taken from me and given to a man, I feel that I have been mistreated and damaged." *Id.* at 161.

When the charging party sued in court, she sued on the basis of sex discrimination, which had been fully investigated, and her judicial complaint, which was an individual one, not a class action, was directed at the specific wrong which affected her.

The Seventh Circuit relies on that decision to:

- (1) Disregard entirely the policy of Title VII favoring conciliation and voluntary compliance;
- (2) Repudiate any requirement of a nexus between the charge and the complaint.

The Seventh Circuit decision in this case abolishes the "like and related" test as stated in *Danner*. As the dissenters in the present case so accurately concluded:

"If the relatedness or growing-out-of requirement is to be abolished, I would have no objection. I cannot agree, however, that if there is such a requirement it has been satisfied with respect to the pattern and practice charges described above."

It is no exaggeration to say that the Seventh Circuit's decision in this case conflicts with all decisions in which the "like and related" test has been applied.

The Seventh Circuit decision also conflicts squarely with the policy stated in *Sanchez* in that the Seventh Circuit's application of the "like and related" test abrogates entirely the *Sanchez* requirement that the "like and related" issues first be the subject of an EEOC investigation and efforts at compliance prior to the filing of a lawsuit.

The Seventh Circuit decision even conflicts with its own holding in *Bowes v. Colgate-Palmolive Co.*, 416 F.2d at 720:

"The purpose of the section [42 USC § 2000e-5(e)] (as observed above in discussing the Union) is to provide for notice to the charged party and to bring to bear the voluntary compliance and conciliation

functions of the EEOC. Also, as noted by this court in *Choate v. Caterpillar Tractor Corp.*, 402 F.2d 357, 360 (7th Cir. 1968), and in *Cox v. United States Gypsum Co.*, 409 F.2d 289, 291 (7th Cir. 1969), another important function of filing the charge is to permit the EEOC to determine whether the charge is adequate. Finally, the charge determines the scope of the alleged violation and thereby serves to narrow the issues for prompt adjudication and decision. Cf. *Edwards v. North Amer. Rockwell Corp.*, 291 F. Supp. 199 (C. D. Calif. 1968)."

The Seventh Circuit's decision in this case ignores entirely the notice-giving function of the charge and opens the door to, even invites, litigation which expands the scope of alleged violations beyond any recognition and which nullifies the voluntary compliance and conciliation functions.

Finally, the Seventh Circuit's decision conflicts with the recent decision in *EEOC v. General Elec. Co.*, *supra*. The *G.E.* court held:

". . . the original charge is sufficient to support action by the EEOC as well as a civil suit under the act for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge, provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act." (Court's emphasis.) 532 F.2d at 566.

By contrast, the Seventh Circuit has permitted Plaintiff to raise issues (1) not stated in her charge, (2) not developed in the course of a reasonable investigation, (3) not included in a reasonable cause determination, and (4) not subject to conciliation procedures prior to the filing of the lawsuit.

III.
CONCLUSION

For the reasons stated herein and those expressed by Judges Tone, Pell and Bauer in their dissenting opinion, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Seventh Circuit.

The question of the proper scope of a Title VII lawsuit cries out for the attention of the Supreme Court. Until it has been settled there is no due process under Title VII and until it has been settled the conciliation machinery of Title VII and the policy favoring voluntary compliance remain regrettably compromised.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 72-C-398

BEVERLY JEAN JENKINS,

v.

BLUE CROSS MUTUAL HOSPITAL INSURANCE, INC.

ORDER

This cause is before the Court upon the plaintiff's motion, pursuant to Rule 56, for partial summary judgment and/or a preliminary injunction.

Whereupon the Court, having considered the motion and the briefs in support and opposition thereto, the affidavits and evidence presented, and now being duly advised in the premises, hereby finds that there are material issues of fact to be litigated between the parties and summary judgment would be inappropriate. Plaintiff's motion is, therefore, DENIED.

IT IS SO ORDERED.

Dated this 21st day of January, 1975.

/s/ James E. Noland
U. S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 72-C-398

BEVERLY J. JENKINS,

v.

BLUE CROSS MUTUAL HOSPITAL INSURANCE, Inc.,
et al.

ORDER

This cause is before the Court on motions of both parties, pursuant to Rule 23 (c)(1), Federal Rules of Civil Procedure, regarding certification of this action as a class action under Rule 23 (b)(2) and upon a petition by three non-party persons to join this action as plaintiffs.

Whereupon the Court, having considered the briefs of the parties filed in support and opposition to the motions, the exhibits and affidavits, and having heard counsels' argument on those issues, and now being duly advised in the premises, hereby

ORDERS:

(1) That this action not be maintained as a class action for the reason that the alleged class is not so numerous that joinder would be impracticable and, for the reason that there has been no showing that the defendant has acted or refused to act on grounds applicable to a class as a whole.

(2) The motion to intervene filed herein by the three non-party persons is DENIED.

(3) Defendant shall have ten (10) days from the date of this order to respond to plaintiff's motion for sum-

mary judgment and to answer or object to plaintiff's second supplemental inspection notice.

Dated this 17th day of July, 1974.

/s/ James E. Noland
U. S. District Judge

MEMORANDUM ENTRY

This action has been brought by the plaintiff pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under 42 U.S.C. § 1981. Jurisdiction is founded on 28 U.S.C. § 1343(4). She seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201-02, that her civil rights under Title VII have been violated, and she purports to bring this action as a class action under Rule 23 (b)(2), Federal Rules of Civil Procedure.

Plaintiff is a black female person who originally entered the defendant's employ in May 1968. Her complaint alleges that she seeks a permanent injunction against the defendant's policy, practice, custom or usage of discriminating against her and other black and female persons because of race and/or sex. She alleges such discrimination has occurred with respect to terms and conditions of employment, compensation, and privileges of employment in such a way as to deny equal employment opportunity because of race and/or sex.

Plaintiff further alleges that she performed her job with the defendant satisfactorily until April 1971, when she was forced to take vacation, and then a ninety (90) day leave of absence, because of her race, sex, hair, and dress style. She asserts that she returned to work for defendant on September 19, 1971, and continued to work

until May 26, 1972, when she was forced to resign because of her race and sex. She asserts that she was denied promotion because of her race, sex, hair and dress style. She then proceeds to allege civil rights denials in defendant's hiring, testing, promoting, and pay practices. She also seeks money damages as well as injunctive relief.

Both parties have filed motions regarding the maintenance of this suit as a Rule 23 (b)(2) class action; plaintiff requesting it to be certified and defendant requesting that it not be certified. In addition, counsel for plaintiff has filed a motion on behalf of three other persons to intervene as plaintiffs herein. The Court will consider these motions seriatim.

I. CLASS ACTION

Rule 23 sets out the requirements which must be met by the plaintiff to maintain a class action. Rule 23(a) has four such requirements, all of which must be met, and plaintiff must also establish one of the three requirements of Rule 23(b). Plaintiff herein has alleged this to be a (b)(2) action.

The first step, of course, is to look to the allegations of the plaintiff's complaint to see if the prerequisites for a class action have been alleged. However, in the instant case, the Court must take an additional step in relationship to the complaint.

It is clear that a Title VII complaint must be viewed in relationship to the charges filed by the plaintiff against the defendant before the Equal Employment Opportunity Commission [EEOC]. This must be done because it is generally recognized, both by the Circuit Courts and the District Courts, that the scope of plaintiff's complaint, and thus the scope of any class action

founded thereon, is necessarily limited to the scope of the plaintiff's charges filed with the EEOC and any discrimination like or reasonably related to those charges. *Oubichow v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir. 1971); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *EEOC v. Mobil Oil Corp.*, 362 F. Supp. 783 (W.D. Mo. 1973); *Latins v. Rainbo Bakers, Inc.*, 358 F. Supp. 870 (D. Colo. 1973); *Phillips v. Columbia Gas of West Virginia*, 347 F. Supp. 533 (S.D. W.Va. 1972); *aff'd.*, 474 F.2d 1342 (4th Cir. 1973); *Hecht v. CARE, Inc.*, 351 F. Supp. 305 (S.D. N.Y. 1972); *Beckum v. Tennessee Hotel*, 341 F. Supp. 991 (W.D. Tenn. 1971); *Sciaraffa v. Oxford Paper Co.*, 310 F. Supp. 891 (D. Me. 1970); *Burney v. North American Rockwell Corp.*, 302 F. Supp. 86 (C.D. Calif. 1969); *King v. Georgia Power Co.*, 295 F. Supp. 943 (N.D. Ga. 1968); *Reyes v. Missouri-Kansas-Texas R.R. Co.*, 53 F.R.D. 293 (D. Kan. 1971); *Smith v. North American Rockwell Corp.-Tulsa Division*, 50 F.R.D. 515 (N.D. Okl. 1970). Such is necessary not only to provide for possible conciliatory action by the EEOC, but also to "narrow the issues for prompt adjudication and decision." *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969).

Plaintiff filed her charges with the EEOC alleging that she felt she had been discriminated against because of race. Specifically, she asserted that she was denied promotion because her supervisor told her she could not represent the defendant with her Afro hair style. She also alleged that her supervisor accused her of being the leader of the girls on the floor. Finally, she stated that she was required to take a vacation before the defendant

gave her a leave of absence. These charges were filed June 14, 1971, under the EEOC's case number TINI-0339. Thereafter, plaintiff filed this suit in August 1972. The Court stayed the case pending conciliation discussion on her EEOC charges. Plaintiff had received her right to sue letter in August 1972.

Clearly plaintiff's complaint raises many issues and makes many allegations neither like nor reasonably related to her EEOC charge against this defendant. It is clear that she did not raise sex before the EEOC, nor can the Court see any reasonable relationship between hiring, testing or many of the other allegations of the complaint, as compared to her EEOC allegation that she was not promoted because she had an Afro hair style. While there is an arguable connection to race by the allegation of hair style discrimination, such is not sufficient to raise the panorama of alleged evils plaintiff seeks to adjudicate in her complaint. Her class could, therefore, only be composed of those persons denied promotion or not hired for wearing an Afro hair style. Therefore, the next question is whether such a group of persons is so numerous as to require a class action.

No proof has been presented to the Court to show that this group of people would be so large that joinder of them in this action would be impracticable. Further, there has been no allegation or proof that any other persons have undergone plaintiff's alleged deprivation as would be necessary to maintain the class under Rule 23 (b)(2). Consequently, the Court must conclude that this action would not be appropriate for class treatment and the motion to certify the class must be DENIED.

II. INTERVENTION

Three persons have moved, pursuant to Rule 24(b), Federal Rules of Civil Procedure, to intervene in this action as plaintiffs. None of the three have filed charges with the EEOC relating to the allegations they raise in their motion. Further, none of the three have asserted that they were fired, not hired or not promoted because of their hair style. Two of them no longer work for the defendant and allege racial discrimination in hiring and promotion. The third is a female who still is employed by the defendant. She seeks to join the sex discrimination portion of the plaintiff's complaint.

The Court must refuse permissive intervention in this instance because the applicants claims do not have common questions of law and fact with the main action. Further, as this is not a class action, the failure of these plaintiffs to file charges with the EEOC prevents them from raising these claims at this time. *Local 179, United Textile Workers of America, AFL-CIO v. Federal Paper Stock Co.*, 461 F.2d 849 (8th Cir. 1972).

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1231

BEVERLY JEANNE JENKINS,

Plaintiff-Appellant,

v.

BLUE CROSS MUTUAL HOSPITAL INSURANCE, INC.,
BLUE SHIELD MUTUAL MEDICAL INSURANCE, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division—

No. IP 72-C-398

JAMES E. NOLAND, *Judge.*

ARGUED MAY 28, 1975 — DECIDED SEPTEMBER 8, 1975

Before TUTTLE,* TONE and BAUER, *Circuit Judges.*

TUTTLE, *Circuit Judge.* The plaintiff Beverly Jeanne Jenkins brought this action on her own behalf and for a class she purported to represent, charging the defendants, Blue Cross Mutual Hospital Insurance, Inc., Blue Cross Medical Insurance, Inc. (Blue Cross-Blue Shield), her former employer, with racial and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. The district court determined that the action could not proceed as a class action; thereafter the court denied the plaintiff's motion for a preliminary injunction to enjoin the defendants' promotion and employee evaluation practices, which were alleged to have discriminatory effect.

* Hon. Elbert P. Tuttle, United States Circuit Judge, Fifth Circuit, sitting by designation.

The plaintiff appeals the denial of her requested preliminary injunction, pursuant to 28 U.S.C. § 1292(a)(1). The preliminary injunction which was requested would have enjoined the defendants' current employee evaluation and promotion practices. As the plaintiff was no longer employed by the defendants at the time suit was filed, she clearly could not allege irreparable injury to herself resulting from the continued use of these practices. Rather, as the plaintiff candidly admits, it is the harm allegedly suffered by the class of present employees which the plaintiff argues justifies enjoining the defendants' supervisory performance rating system.

Thus, the real issue which the plaintiff seeks to appeal is whether she should be permitted to maintain her suit as a class action; only if the district court erred in denying the plaintiff the right to proceed as a representative of a class of all past and present employees could its subsequent refusal to grant a preliminary injunction be seriously challenged.

I. APPEALABILITY.

Generally a trial court's decision that a suit is inappropriate to proceed as a class action is not a "final decision" and thus cannot be appealed under 28 U.S.C. § 1291.¹ 3B Moore's Federal Practice, ¶23.97 at 23—1951-52. While certain limited exceptions to 28 U.S.C. § 1291's requirement of a final order of the district court have developed permitting interlocutory appellate review of certain class action determinations where those decisions have in some sense a final effect on the action,² these exceptions have been rejected in this circuit as a basis for permitting an appeal from an order refusing

¹ Section 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

² These exceptions are commonly known as the "death knell" and the "collateral order" doctrines. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967). Compare *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 2148-2150 (1974); *Peritz v. Liberty Loan Corp.*, . . . F.2d . . . , No. 74-1867, Slip. Op. p. 6 (7th Cir., Sept. 3, 1975). See generally 3B Moore's Federal Practice, ¶ 23.97.

class status,³ and the plaintiff does not attempt to invoke them. Rather, the plaintiff seeks to review the district court's class action determination by the limited interlocutory appeal permitted by 28 U.S.C. § 1292(a)(1) which provides:

"The courts of appeals shall have jurisdiction of appeals from: (1) interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . ."

While the plaintiff cites no authority for this approach, a substantial body of case law has in fact developed for the view that

"when injunctive relief is sought and the denial of class action treatment has the effect of denying the broad injunctive relief requested in the complaint, the order is appealable under 28 U.S.C. § 1292 (a)(1) as an order denying an injunction."

3B Moore's Federal Practice, ¶ 23.97 (1973 Supp.) at 130. See *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); *Hackett v. General Host Corp.*, 455 F.2d 618, 622 (3rd Cir. 1972); *Yaffee v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Shapiro v. Burnstein & Co.*, 386 F.2d 426 (2d Cir. 1967); *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963).⁴

We find these authorities convincing. Certainly in this case there is an order denying a preliminary injunction, which would permit review under the terms of § 1292(a)(1). Further, there can be no doubt that the district court's earlier refusal to certify the suit as a class action directly controlled its subsequent decision on the requested preliminary injunction.⁵

Because the class action determination of the district court directly controlled the subsequent disposition of

³ *King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973).

⁴ See generally Note, Interlocutory Appeal from Order Striking Class Action Allegations, 70 Colum.L.Rev. 1292 (1970).

⁵ The district court summarily denied the plaintiff's motion for preliminary injunction without assigning any reasons for its decision. We believe the reason the court dealt with the motion in the manner

the request for a preliminary injunction, we believe it, too, is reviewable under 28 U.S.C. § 1292(a)(1). By refusing to certify the action as a class action, the district court effectively precluded a grant of preliminary injunction relief; as the plaintiff was no longer employed by the defendants, Blue Cross-Blue Shield, she clearly suffered no continuing harm from the challenged promotional and employee evaluation practices. Accordingly, in our view, the refusal to certify the suit as a class action limited the potential injunctive relief which the plaintiff could obtain, and accordingly can be appealed at this time.

A conflict has developed in the circuits as to whether a class action decision, standing alone, without an order denying a preliminary injunction is also reviewable under 28 U.S.C. § 1292(a)(1). See *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); *Yaffee v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969); *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963). We note, however, that we do not confront this question in this case. Here the plaintiff specifically and expressly moved for a preliminary injunction, and that request was denied; the plaintiff's appeal is formally from that denial of her motion for preliminary injunction, and thus the question whether an appeal may lie from the refusal to certify a suit as a class action standing alone is not presented by the facts of this case. We express no view as to whether the plaintiff could similarly appeal from the earlier order refusing to certify her suit as a class action.⁶

⁶ (Continued)

it did was because the plaintiff's only arguments in favor of the motion were advanced on behalf of the class which the district court had months before struck from the suit; indeed, the only allegations of irreparable injury concerned the injury to a class the court no longer viewed as part of the suit. Under these circumstances, we are convinced the court's class action determination controlled its subsequent denial of preliminary injunction.

⁶ When the district court denied the plaintiff's request to maintain her suit as a class action it also denied the motions of three other employees of the defendants who sought to intervene in the action, who also alleged racial and sex discrimination. These employees were represented by the same counsel who presently represent the plaintiff. Unaccountably, these intervenors failed to appeal the district court's denial of intervention.

II. CLASS ACTION.

The plaintiff attempted to bring this action on behalf of a class composed of "all black and female persons who are employed, or might be employed, by Blue Cross-Blue Shield, Inc.," alleging discriminatory patterns and practices in employee hiring, promotion, and job evaluation. The plaintiff's Title VII claim asserted both racial and sex discrimination, while her § 1981 claim asserted racial discrimination. The district court refused to certify the action as a class action because it found that the plaintiff's original complaint to the EEOC was too narrow to permit the type of broad claims of racial and sex discrimination presented in the complaint, and accordingly held that the plaintiff was limited by the terms of her prior EEOC charge.⁷

The district court noted that nowhere in the EEOC charge did the plaintiff specifically raise the question of sex discrimination; the court noted that the plaintiff in her EEOC charge did not challenge the hiring and testing practices of Blue Cross-Blue Shield, and while her charge that she was denied a promotion because of her Afro hairstyle had an "arguable connection to race by allegation of hairstyle discrimination, such is not sufficient to raise the panorama of alleged evils the plaintiff seeks to adjudicate."

The district court determined that any class which the plaintiff could represent must be limited by the terms of her EEOC charge, that is, to a class of persons denied promotion due to wearing a natural Afro hairstyle. Accordingly, the district court held that because there was no allegation of numerosity of class members or commonality of legal claims of a class so defined, the plaintiff failed to allege a class which could be maintained under Rule 23 of the Federal Rules of Civil Procedure.

The district court appears not to have considered what effect the plaintiff's second claim based on 42 U.S.C. § 1981 should have on its class action determination.

⁷ In her charge to the EEOC the plaintiff alleged in part that

"I feel that I am being discriminated in the terms and conditions of my employment because of my race, Negro. I have worked for Blue Cross and Blue Shield approx. three years during which time I no problem until May, 1970 when I got my natural hairstyle. Later when I came up for promotion it was denied because my supervisor, Al Frymier, said I could never represent Blue Cross with my Afro. He also accused me of being the leader of the girls on the floor."

In our view, the plaintiff was entitled to make the broad allegations of racial discrimination she did, under § 1981. In our view this action provides a sufficient basis for adjudicating the claims presented in the plaintiff's complaint. We agree with the district court, however, that the failure of the plaintiff to allege sex discrimination in her charge before the EEOC precludes her from raising the issue in this proceeding.

A. 42 U.S.C. § 1981.

42 U.S.C. § 1981 provides that:

"All persons within the jurisdiction of the United States shall have the same right in every state . . . to make and enforce contracts . . . enjoyed by white citizens"

This provision has been uniformly construed to prohibit private discrimination in employment. *Waters v. Wisconsin Steel Works*, 427 F.2d 376 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). See generally Comment, Racial Discrimination and Employment Under the Civil Rights Act of 1866, 36 U.Chi.L.Rev. 615 (1969). This court has held that the passage of Title VII in no way impliedly repealed § 1981, *Waters v. Wisconsin Steel Works*, *supra*, 427 F.2d at 485, noting that "the legislative history of Title VII strongly demonstrates an intent to preserve previously existing causes of action." *Id.* See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974). Indeed, in this court's second *Wisconsin Steel Works* decision, 502 F.2d 1309, 1315 (7th Cir. 1974), this court concurred in the views of the five other circuits which have considered the question in holding that § 1981 is available even to those plaintiffs who have failed to pursue their Title VII administrative remedies. See *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971); *Brady v. Bristol-Myers Co.*,

459 F.2d 621 (8th Cir. 1972); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

Thus, in our view, the plaintiff's claim based upon 42 U.S.C. § 1981 alleging racial discrimination would properly state a class claim even if her other claim based upon Title VII is impermissibly broad in light of her EEOC charge.* "§ 1981 is available to plaintiff without regard to Title VII limitations." *Alpha Portland Cement Co. v. Reese*, 507 F.2d 607, 610 (5th Cir. 1975).

On the limited record before us on this appeal there appear to be unresolved factual questions as to whether the action can proceed as a class action. These questions were not considered by the district court in its earlier order denying class action treatment, based upon the EEOC charge. Two questions appear to us to have importance in determining whether plaintiff can serve as a representative for those black employees who allegedly have been injured by the defendants' discriminatory employee evaluation and promotion practices. First, the plaintiff resigned her employment—but alleges that she did so due to some form of coercion; secondly, it appears that many of the evaluation and promotion practices complained of in the complaint were instituted after the plaintiff left the defendants' employ.

The plaintiff must be a member of the class which she seeks to represent, with sufficient interest in the outcome to assure that she will adequately and fairly represent the class. Fed.R.Civ.P. 23(a). The plaintiff cannot meet these standards if she in fact voluntarily resigned her employment for reasons unrelated to the employee evaluation and promotion practices of which she now complains. On remand the district court should consider these

* We note that the plaintiff properly alleged only racial discrimination as part of her § 1981 claim; § 1981 has been generally read to apply only to discrimination based on race. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968); *Long v. Ford Motor Co.*, 496 F.2d 500, 503 (6th Cir. 1974); *Arnold v. Tiffany*, 487 F.2d 216, 217 (9th Cir. 1973), cert. denied, 94 S.Ct. 1578 (1974); but see *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).

questions in determining whether the requirements of Rule 23 are met.

B. Title VII.

This litigation began when the plaintiff, Beverly Jeanne Jenkins, completed an EEOC charge form on June 8, 1971 naming her former employer, Blue Cross-Blue Shield, as the party which had discriminated against her. She checked the box marked "Race or Color" and made the following statement to explain what in her view constituted the "unfair thing" which had been done to her.

"I feel that I am being discriminated in the terms and conditions of my employment because of my race, Negro. I have worked for Blue Cross and Blue Shield approx. three years during which time I no problem until May, 1971 when I got my natural hairstyle. Later when I came up for promotion it was denied because my supervisor, Al Frymier, said I could never represent Blue Cross with my Afro. He also accused me of being a leader of the girls on the floor. The pressure I was working under kept me upset, therefore, I asked for a leave of absence. I was told I had to take a vacation before I could be granted a leave of absence. I was granted a week vacation and on my return I was asked to take a 90-day leave, quit, or be fired, time they said to get myself together; at the end of this time they would be able to place me on another job. A White employee who associated with me might have been denied her promotion because of her association with me.

The plaintiff received her statutory notice of her right to sue from the EEOC on August 4, 1972.

Plaintiff filed this suit on August 28, 1972 alleging a broad-based pattern and practice of racial and sex discrimination against her and the class she purported to represent in hiring, assignment, pay and promotion.*

* Specifically the plaintiff's complaint alleged that Blue Cross-Blue Shield discriminated on the basis of race and sex by

"a. Maintaining requirements for office and clerical positions which denied blacks equal opportunity for employment in such positions which are neither job-related nor necessary to the safe, efficient conduct of defendant's business.

The district court found that because the plaintiff's EEOC charge limited the scope of the complaint she could subsequently file in federal court under Title VII, any subsequent Title VII action in federal court must be limited to the specific issue of denial of promotion opportunities due to wearing an Afro hairstyle. On that basis, the district court found that the plaintiff had failed to allege that others were injured due to the same discriminatory practice, and accordingly the suit could not be maintained as a class action.

Although this court has not previously enunciated a precise rule for purposes of determining what is the proper scope of the allegations in a complaint when compared against the original charge filed with the EEOC, we are in agreement that the rule as stated in the case of *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971), should be followed. The court in that case said:

"the correct rule to follow in construing EEOC charges for purposes of delineating the proper scope of a subsequent judicial inquiry is that 'the complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the

* (Continued)

b. Requiring employees to stay within strictly delineated confines of dress codes and hairstyles which, not only discriminate against blacks because of their race, but more invidiously imperils the ability of blacks to rid themselves of a vestige of slavery by requiring them to accept white hairstyles and dress styles as a term and condition of employment.

c. Failing and refusing to hire, facilitate the hiring of, or promote persons who are black to supervisory or managerial positions in departments other than those where the majority of workers are black.

d. Assigning blacks and women to the lowest-paying office and clerical jobs and virtually excluding them from higher-paying office and clerical and managerial positions.

e. Paying blacks less money than whites for identical jobs.

f. Failing and refusing to promote blacks and women because of their race and sex.

g. Failing and refusing to hire blacks because of their race.

h. Failing to recruit blacks on the same basis for the same jobs as whites.

i. Utilizing paper and pencil tests which deny and tend to deny black persons equal opportunity for hiring and promotion, which tests are not job-related and are not necessary to the safe and efficient conduct of the defendants' business."

The complaint requested injunctive relief against these practices, as well as reinstatement of the plaintiff and back pay and other restitutionary relief for the plaintiff and other members of the class injured because of the allegedly discriminatory practices.

allegations of the charge and growing out of such allegations."

Danner v. Phillips Petroleum Co., *supra*, 447 F.2d at 162.

Upon careful examination of the complaint and the charge, Judges Bauer and Tone agree that the trial court properly construed the particular charge here in light of the general principles, and that the charge does not form a proper basis for the complaint that the defendant pursued a practice and pattern of discrimination in the manner alleged in the complaint. Judge Tuttle would hold that the charge was sufficient under the announced standard to support the allegations of the complaint.

The Court is unanimously of the view that the charge does not form a proper basis under Title VII for any complaint of discrimination on the basis of sex.

III. CONCLUSION.

In light of the fact that the trial court dismissed the complaint because of the failure of the named plaintiff to qualify as representative of her class under Title VII, without giving consideration to the claim based on § 1981, and since we conclude that the relief claimed under § 1981 need not be based on any form of claim filed with the EEOC, we hold that the judgment of the trial court must be reversed for further consideration of the questions raised under Section II, A of this opinion—that is, whether the named plaintiff terminated her employment voluntarily, and if she did not, whether she can qualify as a representative of the class under Fed.R.Civ.P. 23(a). The court, under such circumstances, will then give consideration to what equitable relief the plaintiff may be entitled to.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1231

BEVERLY JEANNE JENKINS,

Plaintiff-Appellant,

v.

BLUE CROSS MUTUAL HOSPITAL INSURANCE, INC.,

BLUE SHIELD MUTUAL MEDICAL INSURANCE, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division —
No. IP 72-C-398

JAMES E. NOLAND, *Judge.*

REHEARD IN BANC JANUARY 26, 1976

DECIDED JULY 21, 1976

Before FAIRCHILD, *Chief Judge*, SWYGERT, CUMMINGS,
PELL, SPRECHER, TONE and BAUER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal reheard in banc concentrates on whether the alleged victim of racial and sex discrimination made sufficiently like or reasonably related allegations in her charges to the Equal Employment Opportunity Commission to support, and out of which could grow or reasonably be expected to grow, the racial and sex allegations in her judicial complaint.

I.

The plaintiff brought this action on her own behalf and on behalf of other persons similarly situated as a class action, charging the defendants, her former employers, with denying her promotions and better assignments, and with ultimately terminating her employment because of her "race, sex, black styles of hair and dress," in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. The plaintiff sought declaratory and injunctive relief, reinstatement with backpay and other money damages.

On July 17, 1974, the district court denied the plaintiff's motion seeking an order pursuant to F. R. Civ. P. 23(c) (1) determining that the action be maintainable as a class action.¹ The court stated that "a Title VII complaint must be viewed in relationship to the charges filed by the plaintiff against the defendant before the Equal Employment Opportunity Commission." The court's reasoning in denying certification of a class action was that: (1) "[i]t is clear that she did not raise sex before the EEOC . . ."; (2) "[w]hile there is an arguable connection to race by the allegation of hair style discrimination, such is not sufficient to raise the panorama of alleged [racial] evils plaintiff seeks to adjudicate in her complaint"; (3) "[h]er class could, therefore, only be composed of those persons denied promotion or not hired for wearing an Afro hair style"; and (4) "[n]o proof has been presented to the Court to show that this group of people would be so large that joinder of them in this action would be impracticable."

On January 21, 1975, the district court denied the plaintiff's motion for a preliminary injunction. The plaintiff's notice of appeal was from both the July 17, 1974 and January 21, 1975 orders.

¹ Chronologically the defendants first filed a motion for a determination that the action not be maintainable as a class action and subsequently the plaintiff filed a cross motion for a determination that it be so maintainable. The district court order recites the existence of both motions and generally orders that "this action not be maintained as a class action" but in the accompanying "memorandum entry" only the plaintiff's motion is recited as denied.

Upon this appeal a panel of this court reversed the district court's judgment "[i]n light of the fact that the trial court dismissed the complaint because of the failure of the named plaintiff to qualify as representative of her class under Title VII, without giving consideration to the claim based on § 1981, and since we conclude that the relief claimed under § 1981 need not be based on any form of claim filed with the EEOC . . ." *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 522 F.2d 1235, 1241 (7th Cir. 1975). The case was remanded for the district court to give consideration to whether the plaintiff could qualify as a representative of the class upon her § 1981 claim, which alleged only racial discrimination, and thereafter to consider "what equitable relief the plaintiff may be entitled to." *Id.* at 1242.

II.

A petition for rehearing in banc was granted. Every member of the court would reach the same end result as the panel did—that is, reverse the judgment and remand the case. Also every member would do so for at least the same reason as the panel did, namely failure of the district court to give consideration to plaintiff's § 1981 claim.²

At least seven circuits, including this one, have held that § 1981 is independent of Title VII, that Title VII creates no procedural barriers to § 1981 actions, and that § 1981 is available regardless of whether one has pursued his Title VII administrative remedies. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 996 (D.C. Cir.

² Every member of the court also agrees with the panel's conclusion that the district court's judgment is appealable inasmuch as "[h]ere the plaintiff specifically and expressly moved for a preliminary injunction, and that request was denied; the plaintiff's appeal is formally from that denial of her motion for preliminary injunction, and thus the question whether an appeal may lie from the refusal to certify a suit as a class action standing alone is not presented by the facts of this case." 522 F.2d at 1238. Since the panel's decision, the entire court (except Judges Swygert and Bauer) in another case voted against allowing an appeal from a denial of class status as a matter of right absent the denial of a preliminary injunction. *Anschul v. Sitmar Cruises, Inc.*, F.2d (No. 74-1908, May 17, 1976) (see footnote at beginning of opinion reaffirming *King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973) and *Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972)).

1973); *Gersham v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974); *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 763 (3d Cir. 1971); *Alpha Portland Cement Co. v. Reese*, 507 F.2d 607, 610 (5th Cir. 1975); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 652 (5th Cir. 1974); *Hill v. American Airlines, Inc.*, 479 F.2d 1057, 1060 (5th Cir. 1973); *Caldwell v. National Brewing Co.*, 443 F.2d 1044, 1046 (5th Cir. 1971), *cert. den.*, 405 U.S. 916 (1972); *Long v. Ford Motor Co.*, 496 F.2d 500, 503 (6th Cir. 1974); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1315 (7th Cir. 1974), *cert. den.*, U.S. (1976); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 623 (8th Cir. 1972).

Finally, every member of the court would agree with the panel's conclusion that the propriety and nature of equitable relief should depend at the minimum upon the resolution of the § 1981 question.

III.

At this point, however, the views of the court divide. The district court had concluded that the plaintiff's EEOC charges limited her Title VII court complaint to charges of discrimination because of her wearing an Afro hair style. The original appeal panel consisting of Judge Tuttle,³ Tone and Bauer was "unanimously of the view that the [EEOC] charge does not form the proper basis under Title VII for any complaint of discrimination on the basis of sex." 522 F.2d at 1241. Judges Tone and Bauer also agreed with the district court that the EEOC charge did not support allegations of racial discrimination beyond those due to wearing an Afro hair style. "Judge Tuttle would hold that the charge was sufficient under the announced standard to support the [racial] allegations of the complaint."

Id.

Upon the rehearing in banc a majority of the entire court⁴ concluded that the judgment should be reversed

³ Honorable Elbert P. Tuttle, United States Circuit Judge, Fifth Circuit, had been sitting by designation, and wrote the panel's opinion.

⁴ The argument on rehearing and consideration of the case took place before the induction of Judge Harlington Wood, Jr., to fill the vacancy created by the elevation of Judge John Paul Stevens to the Supreme Court on December 19, 1975.

and remanded not only because of the § 1981 claim but also because the plaintiff's EEOC charges adequately support her judicial complaints of racial and sex discrimination.

The plaintiff's charge form, filed on June 8, 1971 with the EEOC, showed a check mark in the box on the form to indicate that the discrimination was because of "Race or Color" but no check mark appeared in the box preceded by the word "Sex." The explanation the plaintiff gave on the form for the discrimination was:

I feel that I am being discriminated in the terms and conditions of my employment because of my race, Negro. I have worked for Blue Cross and Blue Shield approx. 3 years during which time I [had] no problem until May 1970 when I got my natural hair style. Later when I came up for promotion it was denied because my supervisor, Al Frymier, said I could never represent Blue Cross with my Afro. He also accused me of being the leader of the girls on the floor. The pressures I was working under kept me upset, therefore, I asked for a leave of absence. I was told I had to take a vacation before I could be granted leave of absence. I was granted a week vacation and on my return I was asked to take a 90 day leave, quit, or be fired, time they said to get myself together; and at the end of this time they would be able to place me on another job. A White employee who associated with me might have been denied her promotion because of her association with me.

The plaintiff received her statutory notice of her right to sue from the EEOC on August 4, 1972 and filed her complaint in the district court on August 28, 1972.

The entire court accepts the standard referred to in the panel decision as the guiding principle in its determination, namely that set forth in *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971):

The correct rule to follow in construing EEOC charges for purposes of delineating the proper scope of a subsequent judicial inquiry is that "the com-

plaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations."

The majority parts with the panel in its application of the standard.

In *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the Supreme Court unanimously expressed its opinion that "we hold to less stringent standards [the allegations of a *pro se* complaint] than formal pleadings drafted by lawyers . . ." In a case also unanimously decided a few days later, *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972), involving EEOC procedure, the Court said that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiated the process."

We have held that Title VII is to "be construed and applied broadly," *Motorola, Inc. v. McLain*, 484 F.2d 1339, 1344 (7th Cir. 1973), and in doing so, we have recognized that EEOC charges are in layman's language, *Cox v. United States Gypsum Co.*, 409 F.2d 289, 290-1 (7th Cir. 1969). The context in which we must operate was well stated by Judge Bauer in *Willis v. Chicago Extruded Metals Co.*, 375 F. Supp. 362, 365-366 (N.D. Ill. 1974) (footnotes omitted):

[T]he Civil Rights Act is designed to protect those who are least able to protect themselves. Complainants to the EEOC are seldom lawyers. To compel the charging party to specifically articulate in a charge filed with the Commission the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected

[T]he EEOC charges simply stated in laymen's language the "unfair thing that happened" to the plaintiff, that is, the discriminatory discharge

This policy of being "solicitous of the Title VII plaintiff" has been expressed by many courts. *Gamble v. Bir-*

mingham Southern R.R., 514 F.2d 678, 687-689 (5th Cir. 1975); *Danner v. Phillips Petroleum Co.*, *supra*, at 161-2; *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970).

In the present case the plaintiff checked the EEOC form box stating that the "discrimination [was] because of . . . Race or Color." She began describing the "unfair thing done" to her by saying that "I feel that I am being discriminated in the terms and conditions of my employment because of my race, Negro." She said that her supervisor denied her a promotion because she "could never represent Blue Cross with my Afro." A layperson's description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination. The plaintiff stated that for three years prior to wearing her Afro hairstyle, she had no problem. As we have said, "[a] single charge may 'launch a full scale inquiry' " into racial discrimination. *Motorola, Inc. v. McLain*, *supra*, at 1346.

The majority agrees with Judge Tuttle's minority position in the panel decision that the EEOC charge was sufficient to support the racial discrimination allegations of the complaint. 522 F.2d at 1241. Judge Tuttle reached the same conclusion speaking for the Fifth Circuit in *Smith v. Delta Air Lines, Inc.*, 486 F.2d 512 (5th Cir. 1973), where the court held that a charge alleging discrimination stemming from grooming requirements which applied particularly to black persons constituted a sufficient charge of racial discrimination when accompanied by substantially the same general allegation of racial discrimination as here.

In regard to sex discrimination, it is true that the plaintiff did not check the sex discrimination box on the EEOC form. In *Sanchez v. Standard Brands, Inc.*, *supra*, at 462-464, the reverse situation had occurred. The plaintiff had checked only the box labeled "sex" and in her judicial complaint alleged discrimination because of her "national origin." The Fifth Circuit said:

. . . [W]e decline to hold that the failure to place a check mark in the correct box is a fatal error. In the context of Title VII, no one—not even the unschooled—should be boxed out.

In *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199, 202-203 (3d Cir. 1975), *vacated on other grounds*, 44 U.S.L.W. 4350 (March 23, 1976), an alleged victim of sex discrimination checked the wrong box. The court held that lay persons were not to be denied access to the federal courts because of a technical error. Finally, in *Vuyanich v. Republic National Bank*, 409 F. Supp. 1083 (N.D. Tex. 1976), the plaintiff's EEOC charge expressly stated only racial prejudice whereas her judicial complaint alleged both racial and sexual discrimination. The court held that she could proceed on both grounds inasmuch as her EEOC form stated that her superior told her that she [a black female] "probably did not need a job anyway, because her husband was a Caucasian." *Id.*, at 1985, the court concluded that such a statement discriminated against both black persons and females since it could not be made to either a white person or a male. *Id.*, at 1089.

In the present case, the plaintiff charged to the EEOC that her superior, in addition to referring to her Afro hairstyle, "also accused me of being a leader of the girls on the floor." The plaintiff then stated that "[a] White employee who associated with me might have been denied her promotion because of her association with me." These statements taken in conjunction with the charges of racial discrimination also charge sex discrimination.

In *Danner v. Phillips Petroleum Co.*, *supra*, at 161-163, the case relied upon by the panel here in its original decision, the court held that the alleged victim of sex discrimination adequately charged it to the EEOC where all she charged was that "[t]herefore due to the fact that my position was not eliminated, just taken from me and given to a man, I feel that I have been mistreated and damaged."

The majority of this court conclude that the plaintiff sufficiently charged both racial and sex discrimination in her EEOC form in order to be eligible to represent a

class composed of "all black and female persons who are employed, or might be employed, by Blue Cross-Blue Shield, Inc." The panel referred to the fact that the plaintiff was no longer employed by the defendants at the time the suit was filed and then alluded to the fact that upon remand the district court could consider "whether the named plaintiff terminated her employment voluntarily, and if she did not, whether she can qualify as a representative of the class" Upon remand these questions should be considered by the district court in the light of *Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4356, 4357-4358 (March 24, 1976).

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

TONE, *Circuit Judge*, with whom PELL and BAUER, *Circuit Judges*, join, dissenting. I agree with the majority's statement of the governing legal principles. My only disagreement is in the reading of plaintiff's charge filed with the EEOC, which is quoted in full in the majority opinion. The reader of these opinions can judge for himself whether the present challenges to defendant's recruitment and promotion practices, including testing, pay-scale, and job-qualification standards (see 522 F.2d at 1240 n. 9), are "like or reasonably related to the allegations of the [EEOC] charge and growing out of such allegations."* See *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971). It appears to me that plaintiff made it clear she was not complaining about such practices when she said in her EEOC charge:

"I have worked for Blue Cross and Blue Shield approximately 3 years during which time I [had] no problem until May 1970 when I got my natural hair style."

I can find nothing elsewhere in the charge that contradicts or qualifies this statement and nothing that suggests a

* I do not include among the allegations which are not supported by the charge the one to the effect that black employees were required to observe white hair styles and dress styles (item b in footnote 9, 522 F.2d at 1240-1241), which I think does satisfy the *Danner* test.

pattern and practice charge based on race or sex. (I attach no significance to the failure to check the box marked "Sex.") She seems to me to be saying that after three years of employment about which she has no complaints she had her hair styled in an Afro fashion, and was unfairly treated because of that. If the relatedness or growing-out-of requirement is to be abolished, I would have no objection. I cannot agree, however, that if there is to be such a requirement it has been satisfied with respect to the pattern and practice charges described above.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

Statutory Provisions

Title VII, Civil Rights Act of 1964, Section 706(b), 42 U.S.C. Section 2000(e)-5(b):

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent

of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

Title VII, Civil Rights Act of 1964, Section 706 (f)(1), 42 U.S.C. Section 2000(e)-5(f)(1):

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection

(c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

28 U.S.C. § 1292:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

* * * * *

Federal Rules of Appellate Procedure

Rule 4:

(a) **APPEALS IN CIVIL CASES.** In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

* * * * *

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-448

BLUE CROSS MUTUAL HOSPITAL
INSURANCE, INC.,
BLUE SHIELD MUTUAL MEDICAL
INSURANCE, INC.

Petitioners,

vs.

BEVERLY JEANNE JENKINS

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**BRIEF IN OPPOSITION TO PETITION FOR A
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court review the unanimous determina-
tion of a Circuit Court sitting *in banc* in a case properly

within its jurisdiction that the Order appealed from was necessarily based on an erroneous prior ruling of the District Court?

2. Should this Court review the manner in which the Court below applied the "like or related" test which is accepted in all circuits as the basis for determining whether an E.E.O.C. charge of discrimination is a proper predicate for a lawsuit based on that charge?

COUNTERSTATEMENT OF FACTS

Stripped of its adversarial rhetoric, petitioner's statement of facts is generally accurate. Since there is an accurate summary of the facts set forth in the *in banc* opinion, we will not burden the Court with another recitation of the facts of this case. There are, however, three significant distortions or omissions in Petitioner's statement of the case which should be noted by the Court in ruling upon this Petition.

(1) *Respondent waited over fourteen months after filing her charge of discrimination before filing suit.* The Petition implies that respondent rushed to the Courthouse "before EEOC could investigate or attempt to conciliate her charge." (Petition, p. 5). In fact, respondent, a black woman, filed her charge of discrimination on June 8, 1971 and waited over fourteen months prior to filing suit on August 28, 1972. Thus, EEOC had the opportunity to process the charge for a period of more than double the statutory period of 180 days allowed by 42 USC § 2000e-5(f)(1) for such processing. Respondent did not rush to Court, she waited over eight months longer than she had to before filing suit.

(2) *Petitioners had a full opportunity to conciliate.* The Petition neglects to state that subsequent to the filing of

the complaint, the Court, on December 19, 1972, ordered that the action be stayed for sixty days "in order to encourage voluntary compliance." Despite respondent's willingness to participate in EEOC conciliation, the EEOC found that conciliation failed without the parties ever meeting. Thus, petitioner was given a direct opportunity to conciliate on all the allegations of the complaint and apparently declined it.

(3) *The Agency charged by Congress with administering Title VII supports the interpretation given to the like or related test by the Seventh Circuit.* The Petition fails to state that the Equal Employment Opportunity Commission—the Agency charged by Congress with administering Title VII—filed an amicus brief in support of the petition for rehearing below and argued before the Court *in banc*. The EEOC took the position urged by respondent below and adopted by the Seventh Circuit *in banc* that the like or related test should be liberally construed and that the respondent's EEOC charge was sufficiently like or related to the allegations of her complaint to be a proper predicate for the class action complaint.

ARGUMENT

I.

THE UNANIMOUS DETERMINATION OF THE COURT BELOW THAT THE ORDER APPEALED FROM WAS NECESSARILY BASED ON AN ERRONEOUS PRIOR RULING OF THE COURT RAISES NO QUESTIONS WORTHY OF SUPREME COURT REVIEW

As the Petition states, the District Court on July 17, 1974 denied class certification on the ground that the case was limited to denials of hire or promotion because of Afro hair styles and that there was no showing of a numerous class of victims of this discrimination. It also accurately states that plaintiff's motion for a preliminary injunction and/or partial summary judgment (which had been filed contemporaneously with the class action motion) was denied on January 21, 1975. What it neglects to state is that the only ground stated for this denial was "that there are material issues of fact to be litigated between the parties and summary judgment would be inappropriate." Order of January 21, 1975. (Petition at p. 1a).

When a timely appeal was filed from the January 21 Order, the Seventh Circuit was faced with an order which was erroneous on its face—it is not grounds for the denial of preliminary relief that material issues of fact need to be litigated; the whole purpose of preliminary relief is to provide an interim remedy while material issues are being litigated. The original panel concluded the Court's prior "class action determination controlled its subsequent denial of preliminary injunction" and reviewed the prior

Order as part of the Order denying preliminary relief. Opinion of Panel at fn. 5 and accompanying text. (Petition at pp. 10a-11a.) This finding was accepted by the entire Court *in banc*. This unanimous factual determination concurred in by all eight Circuit Judges who considered the case hardly raises an issue of sufficient importance for Supreme Court review. Thus the Court should clearly deny the Petition with respect to question 1 of the Petition.

II.

THE MANNER IN WHICH THE SEVENTH CIRCUIT INTERPRETED THE LIKE OR RELATED TEST IS NOT A QUESTION THAT SHOULD BE REVIEWED BY THIS COURT.

Although the Petition sets forth three additional questions on which petitioners seek review, all resolve into a single question: did the Seventh Circuit properly apply the "like or related" test for determining whether the original charge was an adequate predicate for the class allegations of race and sex discrimination set forth in the complaint. We show below that this question is not one which merits Supreme Court review.

A. There Is No Conflict Among the Circuits On The General Rule That A Title VII Complaint May Encompass Any Discrimination Like Or Related To The Allegations Of The Charge Or Growing Out Of Such Charge.

The Petition does not assert, nor could it, that there is any conflict among the Circuits in the rule which governs when a Title VII charge is a sufficient predicate for the allegations of the complaint. As stated in the majority opinion below,

"The correct rule to follow in construing EEOC charges for purposes of delineating the proper scope of a subsequent judicial inquiry is that 'the complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations'"

citing *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971). (Petition, p. 22a) This view is concurred in by every other Circuit which has considered the question.

See

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973);

Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199, 202-203 (3rd Cir. 1975);

Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975);

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970);

Tipler v. E. I. Dupont & Nemours Co., 443 F.2d 125 (6th Cir. 1971);

Ouchibon v. North American Rockwell Co., 482 F.2d 569 (9th Cir. 1973).

The rationale of these cases is eloquently stated in *Sanchez v. Standard Brands*:

"Procedural technicalities are not to stand in the way of Title VII complainants. Nothing in the Act commands or even condones the application of archaic pleading concepts. On the contrary, the Act was designed to protect the many who are unlettered and

unschooled in the nuances of literary draftsmanship. It would falsify the Act's hopes and ambitions to require verbal precision and finesse from those to be protected, for we know that these endowments are often not theirs to employ . . . it would be out of keeping with the Act to import common law pleading niceties to [the charge of discrimination] or in turn to hog-tie the subsequent lawsuit to any such concepts." 431 F.2d at 465.

Unable to find any conflict in the general rule governing the scope of private actions which may be brought after a charge of discrimination is filed, petitioners strain to find a conflict between the decision in this case and the rules applicable to the EEOC when it exercises its direct enforcement power pursuant to 42 USC § 2000e-5(f)(1) of the Act. They argue that the decision in *EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976) is somehow in conflict with the instant decision. This is clearly not true. That case involved the question of whether the EEOC had standing to raise questions of sex discrimination against women when the private charges based on which it filed suit were filed by black males and alleged only race discrimination. The Court held that inasmuch as the EEOC had uncovered the pattern of sex discrimination during the course of a reasonable investigation of the charge filed, EEOC could bring suit for such sex discrimination even though the private plaintiffs were males, and might not have had standing to complain about discrimination against females.

Thus, *General Electric* holds only that EEOC may bring suit on any discrimination disclosed in the course of a reasonable investigation; it does not speak to the issue on which petitioners seek *certiorari*—the scope of a private lawsuit where EEOC has either not investigated or conducted a limited investigation.

Decisions in private lawsuits make it clear that:

"the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."

Sanchez v. Standard Brands, supra, 431 F.2d at 466. (Emphasis added.) The uniformly accepted test is that the scope of the lawsuit is not limited by what EEOC did or did not investigate, but only what it *might* have investigated in a reasonable investigation. For example, even where the EEOC investigation does not extend to issues which it might have, the scope of a private lawsuit is not limited by the failure of EEOC to conduct a complete investigation. See *Gamble v. Birmingham Southern RR Co.*, 514 F.2d 678 (5th Cir. 1975). As *General Electric* makes clear, the scope of an EEOC investigation even on a narrow charge may be broad indeed. Thus, it supports the view of the Seventh Circuit that charges be given an expansive and sympathetic reading.

B. The Application of the General Rule to the Facts of the Instant Case Is Hardly An Issue Meriting Supreme Court Review.

When viewed in the context of the universally accepted rule that Title VII charges should be given an expansive reading, petitioners' quarrel with the decision below is really a quibble—they complain that the Seventh Circuit followed the policy of giving charges a sympathetic and expansive reading too well and gave the charge a broader reading than was reasonable. Even if this contention were true, which it is not, such an issue hardly makes a compelling case for Supreme Court review. With its case load, this Court should concern itself with cases whose decision

has important precedent setting value and not spend its time applying generally accepted rules of law to the peculiar facts of a specific case.

C. The Decision Below Makes No Inroads On the Policy In Favor of Conciliation and Voluntary Compliance.

With great solemnity and even greater hypocrisy, petitioners exalt the policy in favor of conciliation and voluntary compliance and claim that giving private parties the right to bring lawsuits broader than their EEOC charges frustrates this policy. As noted in the Counterstatement of Facts above, this action was stayed and petitioners given an opportunity to conciliate which they eschewed. It hardly lies in their mouths to complain that they were not given the opportunity to conciliate. cf. *Piva v. Zerox Corp.*, — F.Supp. —, 11 FEP Cases 1259, 1262-63 (N.D. Cal. 1975).

In addition, in the zeal of their advocacy, they seriously mislead the Court as to the nature of private Title VII proceedings. They imply that the ruling of the Court below makes serious inroads on the policy in favor of voluntary compliance and conciliation. This is not true. In order to properly evaluate their argument some background on the relationship of the administrative charge to the Court proceeding is essential.

Under 42USC § 2000e-5(f) (1), private parties have an absolute right to sue after one hundred-eighty days regardless of whether the EEOC has investigated the charge or attempted conciliation:

"... if within one hundred and eighty days from the filing of [a] charge ... the Commission has not filed a civil action under this section ... or the Commission has not entered into a conciliation agreement

to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved."

Thus, as this Court has made explicit, there are only two jurisdictional prerequisites to bringing suit under Title VII: (1) timely filing of a charge with the EEOC and (2) receiving and acting upon the statutory notice of the right to sue. *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 44 (1974). Thus, the failure of EEOC to process a charge in any manner is no bar to a Court suit.

What this means in the instant case is that if respondent had originally filed a charge of discrimination which was drafted by a lawyer and made explicit her less well articulated charges of class discrimination, one hundred and eighty days later she would have a right to bring a suit as broad as she did in her actual federal court suit. This would have been true even though EEOC had in no way investigated her charge or attempted conciliation. Petitioners would have a different result prevail here merely because respondent is not a lawyer and did not draft her charge as a pleading in a lawsuit. As the Court below indicated:

"[t]he Civil Rights Act is designed to protect those who are least able to protect themselves. Complainants to the EEOC are seldom lawyers. To compel the charging party to specifically articulate in a charge filed with the Commission the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected . . ."

Opinion below at p. 23a, quoting *Willis v. Chicago Extruded Metals Co.*, 375 F.Supp. 362, 365-366 (N.D. Ill. 1974).

There are additional policy reasons why the ruling of the Court below is appropriate. Petitioners' arguments, if accepted, would limit the role of the private lawsuit in Title VII proceedings in every case where EEOC has been unable to complete processing of the charge. Such a limited role flies in the face of this Court's holding that:

"the private action remains an essential means of obtaining judicial enforcement of Title VII."

Alexander v. Gardner-Denver Co., *supra*.

Moreover, the rule urged by petitioner would serve to further encumber the administrative procedure, not promote conciliation. As this Court has noted, there are "significant delays that have attended administrative proceedings in the EEOC" because of its backlog of cases. *Johnson v. Railway Express Agency*, 421 US 454 at fn. 11 (1975). The rule urged by petitioner would contribute to further delays by discouraging private parties from suing until the EEOC had fully processed the charge. In its brief *amicus* in support of the petition for rehearing and at oral argument, the EEOC made clear that it urged a broad reading of the charge not only because of its philosophical support for full enforcement of Title VII rights, but also because of its very practical need for the assistance of private class actions to eliminate discriminatory practices and help clean up its seriously overloaded docket. With such aid, the Government will be able to reduce its backlog of old cases and bring its administrative processes to cases more quickly. Without it, the EEOC will continue to labor under the burden of an intolerable case load and be less able to function efficiently in any of the cases. Thus, peti-

tioners' programmatic support for conciliation does not make good general policy sense. In practice, of course, this support is a disingenuous attempt to use a legal technicality to preclude scrutiny of their employment practices.

CONCLUSION

For all of the foregoing reasons, the petition should be denied in its entirety. Because petitioners have obtained a stay of the mandate of the Court below, we ask that this be done expeditiously.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of Plaintiff's "Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" has been mailed to Mr. Reed D. Scism, Roberts, Ryder & Rogers, One Indiana Square #2020, Indianapolis, Indiana 46204, this 27th day of October, 1976.

/s/ John O. Moss

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